

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL ALLEN CUPP,

Defendant-Appellee.

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UNPUBLISHED

January 19, 2001

No. 225139

Oakland Circuit Court

LC No. 99-007223-AR

Before: Collins, P.J., and Jansen and Zahra, JJ.

JANSEN, J. (*dissenting*).

The prosecution has appealed this case, on leave granted, from decisions of the district court and circuit court ordering that defendant's blood alcohol test results be suppressed. I would affirm these rulings.

On September 16, 1996, defendant was driving in the city of Hazel Park at 1:12 a.m. when he made a prohibited right turn at a red traffic light. He was immediately pulled over by Hazel Park police officers and he told the police that he had consumed two bottles of beer within the past hour. Defendant refused a preliminary breath test, but police officers subsequently obtained a search warrant. Two blood samples were drawn from defendant at 3:48 a.m. and 3:49 a.m. and both revealed a blood alcohol level of .12 percent. Defendant was subsequently charged with operating a motor vehicle under the influence of liquor, second offense. MCL 257.625(1); MSA 9.2325(1).

On October 30, 1998, defendant filed a motion to suppress the results of the blood alcohol tests, contending that the results were inadmissible because the tests were not taken within a reasonable time. On February 5, 1999, the district court held an evidentiary hearing and two expert witnesses testified: David Schneider, PhD., an associate professor of pharmacology at Wayne State University Medical School, testified on behalf of defendant and Julia Pearson, PhD., a forensic scientist trained in liver toxicology with the Michigan State Police Crime Laboratory, testified on behalf of the prosecution.<sup>1</sup> On March 1, 1999, the district court issued a

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<sup>1</sup> Schneider's doctorate is in pharmacology and Pearson's doctorate is in pharmacology, toxicology, and environmental toxicology.

written opinion ruling that the blood alcohol tests were too remote in time to indicate reliably defendant's blood alcohol content at the time that he was operating his motor vehicle.

The district court's decision was entirely supported by case law at the time that it issued its decision. Beginning with *People v Kozar*, 54 Mich App 503; 221 NW2d 170 (1974), the appellate courts had held that the implied consent statute, MCL 257.625a(6)(a); MSA 9.2325(1)(6)(a), required the prosecution to make a preliminary showing that the test was performed within a reasonable time of the offense. Accord, *People v Wager*, 233 Mich App 1; 592 NW2d 389 (1998); *People v Hanna*, 223 Mich App 466; 567 NW2d 12 (1997); *People v Jacobsen*, 205 Mich App 302; 517 NW2d 323 (1994), rev'd on other gds 448 Mich 639; 532 NW2d 838 (1995); *People v Schwab*, 173 Mich App 101; 433 NW2d 824 (1989); *People v Krulikowski*, 60 Mich App 28; 230 NW2d 290 (1975). Further, whether a sufficient foundation had been laid for the admissibility of the blood alcohol tests was a question for the court within its discretion. *Schwab*, *supra*, p 104.

The prosecution appealed the district court's decision to the circuit court and the circuit court affirmed the district court's decision. By June of 1999, three months after the district court issued its decision, but before the circuit court issued its decision, our Supreme Court decided *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999), and explicitly overruled *Kozar* and its progeny. The Court in *Wager* held that "[t]o the extent that the passage of time reduces the probative value of the [blood alcohol] test, the diminution goes to weight, not admissibility, and is the for parties to argue before the trier of fact." *Id.*, p 126. The main question for the circuit court was whether the Supreme Court's decision in *Wager* should be given retroactive affect since *Wager* had not been decided at the time that the district court issued its decision.

The circuit court ruled that *Wager* should not be applied retroactively and the majority reverses on this issue and concludes that *Wager* is applicable to this case. Although I do not disagree with the majority on this point, I would affirm the circuit court on the alternative basis that the blood alcohol tests cannot be admitted under the threshold relevancy requirement of MRE 401, 402, and 403. The majority has glossed over this issue in footnote one of its opinion, but I believe that this issue deserves much closer scrutiny.

In *People v Campbell*, 236 Mich App 490, 506; 601 NW2d 114 (1999), an opinion issued after the Supreme Court's decision in *Wager*, this Court held that "the implied consent statute and the policy regarding drinking and driving support the conclusion that the only prerequisite to admission of blood alcohol test results is a threshold relevancy requirement, as codified in MRE 401, 402, and 403." To the extent that the majority questions or criticizes this holding in *Campbell*, I would first note that the opinion is precedentially binding and must be followed under MCR 7.215(H)(1). Moreover, *Campbell* was decided after *Wager* and fully acknowledged and applied the Supreme Court's decision in *Wager*. Finally, I believe that the decision in *Campbell* is a correct one because the admission of any evidence is always subject to the threshold relevancy requirements of MRE 401, 402, and 403. See *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998) (the touchstone of admissibility is set forth under MRE 402, which provides that all relevant evidence is admissible and that irrelevant evidence is not admissible); *Campbell*, *supra*, p 502 ("all evidence continues to be subject to all other applicable precedents and rules regarding the admissibility of evidence").

Turning to the decisions of the lower courts, the decision whether to admit evidence is within the trial court's discretion and such a decision will be reversed only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Whether a rule of evidence or statute precludes admission of the evidence is a question of law that is reviewed de novo. *Id.*

The district court concluded that the blood alcohol tests were too remote to indicate reliability and noted plaintiff's expert witness' testimony that defendant's blood alcohol level could have been below the legal limit at the time of the offense because he had, at the time of the offense, a sufficient amount of unabsorbed alcohol in his stomach that later contributed to a .12 percent blood alcohol result that occurred two hours and thirty-six minutes after the traffic violations. The ruling was affirmed by the circuit court on the basis of MRE 403.<sup>2</sup>

I cannot conclude that the district court's ruling was an abuse of discretion. Here, defendant admitted to drinking two bottles of beer in the hour preceding his traffic violation. The blood alcohol tests were taken two hours and thirty-six minutes after the traffic violation. Because of the delay in giving the blood alcohol tests, it was within the province of the district court to rule that the delay of two hours and thirty-six minutes was so long that the test results were unreliable and, therefore, that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. Further, considering the length of the delay in taking the blood tests, the delay could be considered to be so long that the test results did not have some tendency to make the fact of defendant's alleged intoxication *at the time of the traffic violation* to be more or less probable. MRE 401.

The danger in allowing the evidence is that the jury could conclude that because defendant's blood alcohol level was .12 percent more than 2 ½ hours after the police stop, it must have been higher at 1:12 a.m. However, the testimony of the expert witnesses at the evidentiary hearing indicated the difficulty in determining what defendant's blood alcohol level was at the time of the police stop and that such an assumption is not necessarily true. Schneider testified that total absorption of alcohol occurs in 1 to 1 ½ hours after consumption, while Pearson testified that total absorption occurs thirty-five to forty-five minutes after consumption on an empty stomach. Schneider stated that given the amount of information he had, no one could extrapolate backward to determine defendant's blood alcohol level at 1:12 a.m. Pearson believed that it was possible to predict defendant's blood alcohol level at 1:12 a.m. under two different scenarios: (1) assuming total absorption of alcohol at 1:12 a.m., and (2) assuming that the alcohol was not totally absorbed at 1:12 a.m. However, Pearson testified that it was possible that defendant did not have a blood alcohol level of .07 percent or higher at the time of the police stop. Considering the assumptions that the expert witnesses were using, rather than the actual

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<sup>2</sup> MRE 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

evidence of the case, I cannot conclude that the district court abused its discretion in suppressing evidence of the blood alcohol tests as being too unreliable.

I would affirm the circuit court's ruling that likewise affirmed the district court.

/s/ Kathleen Jansen